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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
2002 JUN 26 PM 4:26

NEIL GAIMAN and
MARVELS AND MIRACLES, L.L.C.,

Plaintiffs,

v.

TODD MCFARLANE,
TODD MCFARLANE PRODUCTIONS,
INC., TMP INTERNATIONAL, INC.,
MCFARLANE WORLDWIDE, INC., and
IMAGE COMICS, INC.,

Defendants.

DOC NO
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JW SKUPNIEWITZ
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WEST DIST. OF WISCONSIN
JUN 26 2002
FILED
JOSEPH W. SKUPNIEWITZ CLERK
CASE #

Case No.: 02-C-0048-S

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR
LEAVE TO FILE SURREPLY IN OPPOSITION TO DEFENDANTS'
MOTION FOR JUDGMENT ON THE PLEADINGS

TO: R. Scott Feldmann, Esq.
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PLEASE TAKE NOTICE that plaintiffs Neil Gaiman and Marvels and Miracles, LLC, hereby move the Court, pursuant to Fed. R. Civ. P. 7(b) and the Court's March 5, 2002 Preliminary Pretrial Conference Order, for leave to file a surreply in opposition to defendants' May 21, 2002 Motion for Judgment on the Pleadings. The grounds for this motion are as follows:

follows:

Copy of this document has been
provided to: Simmons, Levin,
Smith, Kahn, Feldmann
this 28 day of June, 2002
By L. Jensen
Deputy Clerk

So Ordered
By the Court
James H. Hodge
District Judge
6/27/02

1. New evidence has been discovered that bears directly on the defendants' pending motion.

2. In their June 20, 2002 reply brief in support of their Motion for Judgment on the Pleadings, the McFarlane Defendants repeatedly (and for the first time) argue that plaintiff Neil Gaiman's claim for copyright ownership in various comic books should be time-barred because defendant Todd McFarlane's copyright registrations in those works provided Mr. Gaiman with "constructive notice" of Mr. McFarlane's adverse claims. (See, e.g., Reply Br. at 4.)

3. On the same day they filed that brief, however, Mr. McFarlane testified at his deposition that his copyright registrations are false. Those registrations falsely describe him as the author of the text of *Spawn* Issues 9 and as the author of both the text and the artwork for *Angela* Issues 1, 2 and 3. Mr. McFarlane testified that he did not author the text for *Spawn* Issues 9 and he did not author any of the text or artwork for *Angela* Issues 1, 2 and 3. (June 20, 2002 Deposition of Todd McFarlane at 147, 157. See also Exs. 35 and 52 to McFarlane Dep.)

4. Mr. McFarlane's testimony regarding the misrepresentation of his authorship in these works creates a serious question regarding the validity of his copyright registrations and whether he should be permitted to use them as a shield to defeat Mr. Gaiman's claim for copyright ownership. See Zitz v. Pereira, 119 F. Supp. 2d 133, 144-45 (E.D.N.Y. 1999) (party deliberately misrepresenting authorship to the Copyright Office loses the presumption of copyright validity). See also Budget Cinema, Inc. v. Watertower Assocs., 81 F.3d 729, 733 (7th Cir. 1996) ("significant questions existed regarding the validity of [plaintiff's] copyright" where, among other things, plaintiff falsely stated authorship in copyright registration).

5. Given that Mr. McFarlane did not provide this testimony until the same day the McFarlane Defendants filed their reply brief, it is in the interest of justice that the plaintiffs be granted leave to file a surreply brief in order to address the significance of that testimony to the issues before the Court.

6. Relevant portions of the transcript of Mr. McFarlane's deposition are attached to the accompanying affidavit of Jeffrey A. Simmons.

7. Plaintiffs' proposed surreply brief has also been filed with this motion.

Dated this 26th day of June, 2002.

FOLEY & LARDNER

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Defendants.

CERTIFICATE OF SERVICE

I, Brenda Allen-Johnson, hereby certify that I am an employee of Foley & Lardner, that on the 26th day of June, 2002, I caused a true and correct copies of the following documents:

1. **Plaintiffs' Notice of Motion and Motion for Leave to File Surreply in Opposition to Defendants' Motion for Judgment on the Pleadings,**
2. **Plaintiffs' Surreply in Opposition to Defendants' Motion for Judgment on the Pleadings, and**
3. **Affidavit of Jeffrey A. Simmons**

to be served on counsel for defendants as shown below:

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